Mohamad Ezam Mohd Nor & Ors v Inspector General of Police

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–15 OF 2001
AUGUSTINE PAUL J
25 APRIL 2001

Preventive Detention *— Detention order — Application for habeas corpus — Application to recuse the judge — Whether application frivolous, vexatious and an abuse of the process of the court*

Preventive Detention *— Detention order — Detention by police pending inquiry — Arrest and detention under s 73(1) of the Internal Security Act 1960 — Whether test to determine validity of detention subjective — Circumstances under which court may examine the sufficiency of reasons for detention — Whether court to apply an objective test — Whether detention order may be challenged on grounds of mala fide — Onus on detainee to show mala fide*

Preventive Detention *— Detention order — Detention by police pending inquiry — Disclosure of information — Whether exhaustive and detailed disclosure of facts made by police — Whether court precluded from carrying out objective assessment of facts*

Preventive Detention *— Detention order — Detention by police pending inquiry — Grounds for detention — Whether sufficient to merely state that there are grounds to justify a detention under s 8 of the Internal Security Act 1960 — Whether specific purpose of detention must be identified — Internal Security Act 1960 ss 8 & 73(1)(a),(b)*

Preventive Detention *— Detention order — Detention by police pending inquiry — Whether arresting officer may decline to disclose grounds for his belief in effecting arrest — Whether officer authorizing detention must be satisfied with the requirements of s 73(1)(a) & (b) of the Internal Security Act — Federal Constitution art 151(3) and Internal Security Act 1960 ss 16, 73(1)(a),(b)*

Preventive Detention *— Detention order — Detention by police pending inquiry — Whether fact that detainee could have been prosecuted for a criminal offence an indication of mala fide*

Preventive Detention *— Detention order — Detention by police pending inquiry — Whether police officers concerned had applied their minds in authorizing detention — Whether applicant had been arrested and detained in the exercise of a valid legal power*

Preventive Detention *— Detention order — Detention by police pending inquiry — Whether the ouster provision under s 8B(1) of the Internal Security Act 1960 applies to arrest and detention under s 73(1) of the Internal Security Act 1960 — Internal Security Act 1960 ss 8B(1) & 73(1)*

Preventive Detention *— Detention order — Detention under Internal Security Act 1960 — Non-disclosure of information under s 16 of the Internal Security Act 1960 — Partial disclosure and partial non-disclosure may be made by relevant authority — Internal Security Act 1960 s 16*

Preventive Detention *— Detention order — Right to counsel — Circumstances under which an Internal Security Act detainee may have legal access*

Mohamad Ezam bin Mohd Nor ('Ezam') and four others filed a motion for the issue of a writ of habeas corpus to secure their release, having been arrested and detained under s 73(1) of the Internal Security Act 1960 ('the ISA'). Subsequent to the arrests, the respondent issued a press statement stating, inter alia, that the arrests were necessary in view of the involvement of the five and others in activities prejudicial to the security of the country and that further investigations were necessary. The statement further referred to a planned 'Black 14' demonstration. At the commencement of proceedings, the applicants agreed to base their arguments on Ezam's motion with the result binding on the other motions. Counsel urged the judge hearing the application to recuse himself on the ground that the judge was the same judge who had convicted and sentenced Dato' Seri Anwar Ibrahim (see *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1) on 14 April 1999 — the date referred to as Black 14 in the press statement. The conviction and sentence, said counsel, was the subject matter of strong public criticism. Counsel contended that although there was no assertion of actual bias, there may be a perception of bias as the facts were in the public domain. On the merits of the case, the following issues were considered by the court: (i) whether a subjective test applied in determining the validity of a detention under s 73(1) of the ISA; (ii) in what circumstances a court may examine the sufficiency of the reasons for a detention under s 73(1) of the ISA; (iii) whether and in what circumstances an order of detention could be challenged; (iv) the nature of the right of non-disclosure given to the authorities under s 16 of the ISA; (v) whether the arresting officer is required to set out in full the words of s 8(1) of the ISA; (vi) whether the arresting officer may decline to disclose the grounds for his belief in effecting arrest; (vii) whether the applicant had been arrested and detained in the exercise of a valid legal power; (viii) whether the press statement of the respondent contained an exhaustive and detailed disclosure of the facts thereby allowing the court to objectively assess whether the arrest and detention of the applicant was justified; (ix) whether the arrest and detention of the applicant under the ISA when he could have been prosecuted for a criminal offence was mala fide; (x) the scope of a detainee's right to legal access under the ISA; (xi) whether the ouster provision in s 8B(1) of the ISA applied to detentions under s 73(1) of the ISA; (xii) given the ouster provision in s 8B(1) of the ISA, whether the court's jurisdiction on matters of mala fide was excluded.

Held, dismissing the motions:

(1) Any attempt made to hold a judgment against the decider whether directly or indirectly, explicitly or implicitly or even dressed and fashioned as a perception will strike at the very core of the

administration of justice and lead to the destruction of the independence of the judiciary. A criticism can be said to be fair, even when wrong, if it is based on a legal analysis of the issues decided in a case. A criticism cannot be fair when it is built upon facts which are not truly stated and also when it is based mostly on surmises or unauthorized versions furnished by interested parties. On the facts, the application made to recuse the judge was frivolous, vexatious and an abuse of the process of the court. Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case, it is equally wrong for him to disqualify himself from hearing a case when there are no grounds to do so (see pp 499C–D, 500C–D, 501A).

(2) The test to determine the validity of a detention order made under s 8(1) of the ISA is subjective. As s 73(1) and s 8(1) of the ISA are so inextricably connected, the subjective test should be applied to both sections. The result is that the court cannot require a police officer to prove to the court the sufficiency of the reason for his belief under s 73(1) of the ISA (see pp 501I–502A).

(3) However, the court may examine the sufficiency of the reasons for detention under s 73(1) of the ISA where the facts of a case are furnished voluntarily, exhaustively and in great detail by the detaining authority for the consideration of the court in which event the court may make its own evaluation and assessment and come to a reasonable conclusion (see *Re Tan Sri Raja Khalid bin Raja Harun* [1998] 1 MLJ 182). The right to make an evaluation in such circumstances means that the test would be an objective one. If the detaining authority has made a partial disclosure with a right of non-disclosure asserted over the other part this procedure will be of no avail with the result that the test to determine the validity of the arrest and detention will be the subjective one. In that event the detainee must show that the detention is male fide (see p 503F–I).

(4) The subjective nature of the reasons for detention does not mean that an order of detention cannot be challenged. It can be challenged on the ground that it was made mala fide. Once the detaining authorities show that the detainee has been detained in exercise of a valid power, it is for the detainee to show that the power has been exercised mala fide or improperly, which means that it is made for a 'collateral' or 'ulterior' purpose, that is to say, a purpose other than those set out in art 149 of the Federal Constitution ('the Constitution') and as in this case for a purpose other than for preventing the detainee from doing acts prejudicial to the security of Malaysia. The burden shifts to the detainee because s 73(7) of the ISA provides that a person detained pursuant to the powers conferred shall be deemed to be in lawful custody (see p 502E, G, I).

(5) By virtue of s 16 of the ISA and art 151(3) of the Constitution, a police officer or the Minister cannot be required to furnish facts whose disclosure would in their opinion be against the national interest. The scope of s 16 is not limited to Chapter II of the ISA where it appears but also to s 73(1) which is in Chapter VI of the ISA. Since the right of non-disclosure applies only to facts whose disclosure would be against the national interest there can be disclosure of facts which are not against such interest. As the right (of non-disclosure) is that of the authority concerned, it may, in an appropriate case, waive the right. Thus, in a particular case, there can be partial disclosure and partial non-disclosure of facts. It is the right of non-disclosure that makes the test under s 8(1) and s 73(1) of the ISA a subjective one, as in the absence of any disclosure the court would be in no position to make a ruling on the validity of the arrest and detention (see p 503A, D–F).

(6) The reference to s 8 of the ISA in s 73(1)(a) of the ISA is only to the grounds which would justify a detention. It is therefore sufficient if it is stated as required by s 73(1)(a) of the ISA, that there are grounds which would justify a detention under s 8 of the ISA. Pursuant to s 73(1)(b) of the ISA the specific purpose of detention must be identified. A setting out in full of the language in s 8(1) of the ISA would be fatal as it would result in the specific purpose of detention being not identified and would also render s 73(1)(b) superfluous (see p 506G–I).

(7) Article 151(3) of the Constitution and s 16 of the ISA allow the arresting officer to decline to disclose the grounds for his belief in effecting arrest. There is no express stipulation in s 73(3) of the ISA for the officer authorizing the detention to be satisfied with the requirements of s 73(1)(a) and (b) of the ISA as in the case of the arresting officer. However, in effect the officer authorizing detention must be satisfied with the requirements of s 73(1)(a) and (b) of the ISA, though he need not disclose the reasons. Any disclosure of the reasons would violate the right conferred by s 16 and art 151(3) of the Constitution, which the arresting officer had asserted in this case (see p 507A, D–E).

(8) Paragraphs 4 and 5 of the arresting officer's affidavit showed that he had complied with the requirements of s 73(1)(a) and (b) of the ISA in effecting the arrest and detention of the applicant. The two further affidavits of the officers authorizing detention also showed that the requirements of s 73(3)(a) and (b) have been complied with in authorizing the further detention of the applicant. The detention orders further showed that the officers concerned had applied their mind in authorizing the detention. On the facts therefore, the applicant had been arrested and detained in the exercise of a valid legal power (see p 507F–H).

(9) The press statement of the respondent did not contain an exhaustive and detailed disclosure of the facts as the specific

allegations made in it did not refer to the applicant. Even if they did, the fact that further investigation is required meant that the press statement was not exhaustive. The disclosure against the applicant was therefore only partial. The court could not make an objective assessment and evaluation in order to ascertain whether the arrest and detention of the applicant was justified, in the absence of the necessary facts to do so (see pp 509G–510A).

(10) The arrest and detention of a person under the ISA when he could have been prosecuted for a criminal offence is no indication of mala fides. It is for the detaining authority to decide whether an act which is criminal in character is of such nature or proportion as to threaten national security that it would be inadequate to deal with it as an ordinary criminal offence but warrants it being dealt with under the ISA (see p 512D–E).

(11) The submission that the affirmation of a further affidavit by the respondent stating there were other reasons to justify the detention was an act of bad faith could not be sustained as it overlooked the right of the respondent under art 151(3) of the Constitution and s 16 of the ISA to make or not to make disclosures as he considers necessary. Although the court was unable to consider the press statement of the respondent as it was only a partial disclosure, nevertheless what was disclosed did not reveal any mala fides (see p 513B–D).

(12) The right to legal access in the case of a person detained under the ISA must be considered in the light of art 151(3) of the Constitution and s 16 of the ISA. Denial of legal access to a detainee till the police think that it is appropriate to do so is to achieve the object of the provisions permitting non-disclosure of facts. A detainee under the ISA can have legal access only when it does not interfere with police investigation. On the facts, the police action in denying the applicant legal access was in accordance with the law. Even if the applicant had been denied legal access unlawfully, it had no bearing on the application before the court (see pp 514A, C, H, I–515A).

(13) There is an inseparable nexus between ss 8(1) and 73(1) of the ISA. The arrest and detention of a person under s 73(1) is pending inquiries to see if the Minister should make an order under s 8(1). Bearing in mind the object of the ISA and the role of the courts in cases of preventive detention, the restriction on the right of judicial review is of greater significance in the case of s 73(1) than s 8(1) of the ISA in view of the greater dependence of the latter on the former. Parliament clearly intended s 8B(1) to apply to s 73(1) of the ISA. Though the effect of s 8B(1) of the ISA, inter alia, means that the Minister's exercise of discretion cannot be challenged, it must nevertheless be shown that the discretion was exercised in accordance with the ISA. This is an affirmation of the subjective test with the onus cast on the

Minister to show that the detention was done in the exercise of a valid power. Thereafter the onus shifts to the detainee to show that the exercise of the power was mala fide. The court's jurisdiction on matters of mala fide is not excluded (see pp 517A–B, H–I, 518E–G); *Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 3 MLJ 265 not followed; *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 followed.

Obiter:

What the law can and should or ought to be is a part of an inquiry or study for the purpose of proposals for recommendations for policy decisions leading to changes in the law. That is the province of politics. On the other hand the court is confined in its duty to ascertaining what the law is and a corresponding application of it. It cannot afford, nor should it afford itself, the luxury of going beyond that (see p 512H).

[**Bahasa Malaysia summary**

Mohamad Ezam bin Mohd Nor ('Ezam') dan empat orang yang lain telah memfailkan satu usul untuk mengeluarkan satu writ habeas corpus bagi menjamin pembebasan mereka, setelah ditangkap dan ditahan di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('AKDN'). Berikutan tangkapan-tangkapn tersebut, responden telah mengeluarkan satu kenyataan akhbar menyatakan, antara lain, bahawa tangkapan-tangkapan tersebut adalah perlu memandangkan penglibatan mereka berlima dan lain-lain di dalam kegiatan-kegiatan yang menjejaskan keselamatan negara dan bahawa siasatan lanjutan adalah perlu. Kenyataan tersebut seterusnya merujuk kepada satu demonstrasi 'Black 14' yang telah dirancang. Di permulaan prosiding-prosiding tersebut, pemohon-pemohon telah bersetuju untuk menggunakan hujah-hujah mereka terhadap usul Ezam yang membawa kesan yang mengikat atas usul-usul yang lain. Peguam telah mendesak hakim yang mendengar permohonan tersebut untuk mengecualikan diri beliau atas alasan bahawa hakim tersebut adalah hakim yang sama yang telah menyabit dan menghukum Dato' Seri Anwar Ibrahim (see *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1) pada 14 April 1999 — tarikh yang dirujuk sebagai 'Black 14' di dalam kenyataan akhbar tersebut. Sabitan dan hukuman tersebut, peguam mengatakan, adalah perkara pokok yang menjadi kritikan hebat umum. Peguam tersebut menegaskan bahawa walaupun tidak terdapat apa-apa penegasan tentang berat sebelah sebenar, kemungkinan terdapat satu persepsi berat sebelah kerana fakta-fakta tersebut merupakan domain awam. Berdasarkan merit-merit kes, persoalan-persoalan berikut telah dipertimbangkan oleh mahkamah: (i) sama ada satu ujian subjektif terpakai di dalam menentukan kesahihan penahanan tersebut di bawah s 73(1) AKDN tersebut; (ii) dalam keadaan apa suatu mahkamah boleh mengkaji

kecukupan sebab-sebab satu penahanan di bawah s 73(1) AKDN tersebut; (iii) sama ada dan di dalam keadaan di mana satu perintah penahanan boleh dicabar; (iv) sifat mengenai hak ketakdedahan diberikan kepada pihak-pihak berkuasa di bawah s 16 AKDN tersebut; (v) sama ada pegawai penangkapan dikehandaki untuk mengemukakan dengan sepenuhnya perkataan-perkataan s 8(1) AKDN tersebut; (vi) sama ada pegawai penangkapan boleh menolak untuk mendedahkan alasan-alasan kerana kepercayaan beliau di dalam menguatkuasakan tangkapan tersebut; (vii) sama ada pemohon telah ditangkap dan ditahan di dalam pelaksanaan kuasa undang-undang yang sah; (viii) sama ada kenyataan akhbar responden mengandungi satu pendedahan yang lengkap dan terperinci tentang fakta-fakta yang dengan itu membenarkan mahkamah untuk menilai secara objektif sama ada tangkapan dan penahanan pemohon mempunyai justifikasi yang kuat; (ix) sama ada tangkapan dan penahanan pemohon di bawah AKDN tersebut apabila beliau boleh didakwa kerana satu kesalahan jenayah adalah mala fide; (x) skop mengenai hak seorang yang ditahan kepada hak undang-undang di bawah AKDN tersebut; (xi) sama ada peruntukan penyingkiran dalam s 8B(1) AKDN tersebut terpakai kepada penahanan di bawah s 73(10 AKDN tersebut; (xii) jika diberi peruntukan penyingkiran dalam s 8B(1) AKDN tersebut, sama ada bidang kuasa mahkamah ke atas perkara-perkara mala fide tersebut dikecualikan.

Diputuskan, menolak usul-usul tersebut:

(1) Apa-apa percubaan yang dibuat untuk menghalang satu penghakiman terhadap pemutus sama ada secara langsung atau tidak langsung, secara jelas atau tersirat ataupun mengena dan menggayakan sebagai satu persepsi akan mengena dengan tepat terhadap pentadbiran keadilan dan membawa kepada kemusnahan kebebasan kehakiman. Satu kritikan boleh dikatakan adil, walaupun salah, jika ia berdasarkan satu analisa undang-undang tentang persoalan-persoalan yang diputuskan di dalam suatu kes. Satu kritikan tidak boleh dikatakan adil bila ia diasaskan atas fakta-fakta yang tidak dinyatakan dengan benar dan juga apabila kebanyakannya berasaskan agakan atau versi-versi yang tidak sah yang dikemukakan oleh pihak-pihak yang berkepentingan. Atas fakta-fakta tersebut, permohonan yang dibuat untuk mngecualikan hakim tersebut adalah remeh dan menyusahkan dan satu penyalahgunaan proses mahkamah. Sepertimana ia adalah tidak betul bagi seorang hakim untuk mendengar satu kes apabila kemungkinan terdapat satu persepsi yang munasabah tentang berat sebelah jika beliau mendengar kes tersebut, ia adalah sama-sama tidak betul bagi beliau untuk mengecualikan diri beliau daripada mendengar suatu kes apabila tiada alasan untuk berbuat demikian (lihat ms 499C–D, 500C–D, 501A).

(2) Ujian untuk menentukan kesahihan satu perintah penahanan yang dibuat di bawah s 8(1) AKDN tersebut adalah subjektif.

Memandangkan s 73(1) dan s 8(1) AKDN tersebut adalah amat berkaitan, ujian subjektif tersebut hendaklah terpakai ke atas kedua-dua seksyen. Kesan daripadanya adalah bahawa mahkamah tidak menghendaki seorang pegawai polis untuk membuktikan kepada mahkamah kecukupan sebab tentang kepercayaan beliau di bawah s 73(1) AKDN tersebut (lihat ms 501I–502A).

(3) Namun begitu, mahkamah boleh mengkaji kecukupan alasan-alasan untuk penahanan di bawah s 73(1) AKDN tersebut di mana fakta-fakta suatu kes dikemukakan secara sukarela, menyeluruh dan terperinci oleh pihak berkuasa penahanan tersebut untuk pertimbangan mahkamah di mana mahkamah boleh membuat penilaiannya sendiri dan tiba kepada satu kesimpulan yang munasabah (lihat *Re Tan Sri Raja Khalid bin Raja Harun* [1998] 1 MLJ 182). Hak untuk membuat penilaian di dalam keadaan sedemikian bermakna bahawa ujian tersebut adalah satu ujian yang objektif. Jika pihak berkuasa penahanan telah membuat sebahagian daripada pendedahan dengan hak ketidakdedahan yang ditegaskan ke atas bahagian lain prosedur ini tidak akan berhasil dengan kesan bahawa ujian untuk menentukan kesahihan tangkapan dan penahanan tersebut adalah satu ujian yang subjektif. Dalam keadaan tersebut orang yang ditahan mestilah menunjukkan bahawa penahanan tersebut adalah mala fide (lihat ms 503F–I).

(4) Sifat subjektif tentang sebab-sebab untuk penahanan tidak bermakna bahawa satu perintah penahanan tidak boleh dicabar. Ia boleh dicabar atas alasan bahawa ia dibuat mala fide. Sebaik sahaja pegawai yang membuat penahanan menunjukkan bahawa orang yang ditahan tersebut telah ditahan dengan penggunaan kuasa sah, ia adalah untuk orang yang ditahan untuk menunjukkan bahawa kuasa tersebut telah digunakan mala fide atau tidak betul, yang bermakna bahawa ia telah dibuat untuk satu tujuan 'kolateral' atau 'tersembunyi', yang mengatakan, satu tujuan selain daripada yang dinyatakan dalam perkara 149 Perlembagaan Persekutuan ('Perlembagaan tersebut') dan sepertimana di dalam kes ini bagi satu tujuan selain daripada menghalang orang yang ditahan daripada membuat tindakan-tindakan yang prejudis kepada keselamatan Malaysia. Beban tersebut beralih kepada orang yang ditahan kerana s 73(7) AKDN memperuntukkan bahawa seseorang yang ditahan menurut kuasa-kuasa yang dibincangkan hendaklah dianggap berada dalam jagaan yang sah (lihat ms 502E, G, I).

(5) Menurut s 16 AKDN tersebut dan perkara 151(3) Perlembagaan tersebut, seorang pegawai polis atau Menteri tidak dikehendaki untuk mengemukakan fakta-fakta di mana pendedahan mereka akan pada pendapat mereka adalah bertentangan dengan kepentingan nasional. Skop s 16 adalah tidak terhad kepada Bab II kepada AKDN tersebut di mana ia timbul tetapi juga

kepada s 73(1) yang terdapat dalam Bab VI kepada AKDN tersebut. Memandangkan hak ketidakdedahan terpakai hanya kepada fakta-fakta di mana pendedahan mereka adalah bertentangan dengan kepentingan nasional maka bolehlah terdapat pendedahan fakta-fakta yang bukan bertentangan dengan kepentingan nasional. Memandangkan hak (ketidakdedahan) adalah mengenai pihak berkuasa yang berkaitan, ia boleh, di dalam kes yang sesuai, mengenepikan hak tersebut. Oleh itu, di dalam suatu kes bolehlah terdapat sebahagian pendedahan dan sebahagian ketidakdedahan fakta-fakta. Adalah hak ketidakdedahan yang menjadikan ujian di bawah s 8(1) dan s 73(1) AKDN tersebut subjektif, kerana dengan ketiadaan apa-apa pendedahan mahkamah tidak berada dalam apa-apa kedudukan untuk membuat satu keputusan tentang kesahihan tangkapan dan penahanan tersebut (lihat ms 503A, D–F).

(6) Rujukan kepada s 8 AKDN tersebut di dalam s 73(1)(a) AKDN tersebut hanya untuk alasan-alasan yang akan menjustifikasikan satu penahanan. Adalah dengan itu mencukupi jika ia dinyatakan sebagaimana yang dikehendaki oleh s 73(1)(a) AKDN tersebut, bahawa terdapat alasan-alasan yang akan menjustifikasikan satu penahanan di bawah s 8 AKDN tersebut. Menurut s 73(1)(b) AKDN tersebut tujuan khusus penahanan mestilah dikenalpasti. Penyataan lengkap ungkapan dalam s 8(1) AKDN tersebut adalah memudaratkan kerana ia akan mengakibatkan tujuan khusus penahanan tersebut tidak boleh dikenalpasti dan akan juga menyebabkan s 73(1)(b) menjadi tidak diperlukan (lihat ms 506G–I).

(7) Perkara 151(3) Perlembagaan tersebut dan s 16 AKDN tersebut membenarkan pegawai yang membuat penahanan untuk menolak untuk mendedahkan alasan-alasan kepercayaan beliau dalam menguatkuasakan tangkapan tersebut. Tiada syarat yang jelas dalam s 73(3) AKDN tersebut untuk pegawai yang menguatkuasakan penahanan tersebut memenuhi keperluan s 73(1)(a) dan (b) AKDN tersebut sebagaimana dalam kes pegawai yang membuat penahanan. Namun begitu, kesannya pegawai yang menguatkuasakan penahanan tersebut mestilah memenuhi keperluan-keperluan s 73(1)(a) dan (b) AKDN tersebut, tapi beliau tidak perlu mendedahkan sebab-sebab tersebut. Apa-apa pendedahan tentang sebab-sebab tersebut akan mencabuli hak yang dibincangkan oleh s 16 dan perkara 151(3) Perlembagaan tersebut, yang mana pegawai yang membuat penahanan telah tegaskan di dalam kes ini (lihat ms 507A, D–E).

(8) Perenggan-perenggan 4 dan 5 kepada afidavit pegawai yang membuat penahanan menunjukkan bahawa beliau telah mematuhi keperluan-keperluan s 73(1)(a) dan (b) AKDN tersebut di dalam memberi kesan tangkapan dan penahanan pemohon.

Kedua-dua afidavit selanjutnya oleh pegawai-pegawai yang menguatkuasakan penahanan tersebut juga menunjukkan bahawa keperluan-keperluan s 73(3)(a) dan (b) telah dipenuhi di dalam menguatkuasakan penahanan pemohon seterusnya. Perintah-perintah penahanan selanjutnya menunjukkan bahawa pegawai-pegawai berkaitan telah menggunakan fikiran mereka di dalam menguatkuasakan penahanan tersebut. Atas fakta-fakta tersebut, pemohon telah ditangkap dan ditahan dengan penggunaan kuasa undang-undang yang sah (lihat ms 507F–H).

(9) Kenyataan akhbar responden tidak mengandungi suatu pendedahan yang menyeluruh dan terperinci tentang fakta-fakta kerana dakwaan-dakwaan khusus yang dibuat di dalamnya tidak merujuk kepada pemohon. Walaupun jika terdapat sedemikian, hakikat bahawa siasatan lanjut adalah perlu bermakna bahawa kenyataan akhbar tersebut tidak menyeluruh. Pendedahan terhadap pemohon oleh demikian hanyalah sebahagian sahaja. Mahkamah tidak boleh membuat satu penilaian objektif bagi tujuan menentikan sama ada tangkapan dan penahanan pemohon adalah patut, di dalam ketiadaan fakta-fakta yang perlu untuk berbuat demikian (lihat ms 509G–510A).

(10) Penangkapan dan penahanan seseorang di bawah AKDN tersebut apabila beliau boleh didakwa untuk satu kesalahan jenayah tidak menandakan apa-apa mala fide. Adalah untuk pihak berkuasa yang menahan untuk memutuskan sama ada satu tindakan yang berunsur jenayah adalah bersifat atau terjumlah untuk mengancam keselamatan nasional bahawa ia adalah tidak mencukupi untuk memperkatakannya sebagai satu kesalahan jenayah biasa tetapi mewarankan ia dibicarakan di bawah AKDN tersebut (lihat ms 512D–E).

(11) Penghujahan bahawa pengesahan satu afidavit lanjutan oleh responden yang menyatakan terdapat sebab-sebab lain untuk menjustifikasikan penahanan tersebut adalah satu tindakan berniat jahat yang tidak boleh dikekalkan kerana ia telah terlepas perhatian tentang hak responden di bawah perkara 151(3) Perlembagaan tersebut dan s 16 AKDN tersebut untuk membuat atau tidak membuat pendedahan-pendedahan yang beliau fikirkan perlu. Walaupun mahkamah tidak dapat mengambil kira kenyataan akhbar tersebut kerana ia hanya sebahagian pendedahan tersebut, namun begitu apa yang didedahkan tidak menunjukkan apa-apa mala fide (lihat ms 513B–D).

(12) Hak kepada undang-undang di dalam kes di mana seseorang ditahan di bawah AKDN tersebut mestilah diambilkira berdasarkan perkara 151(3) Perlembagaan tersebut dan s 16 AKDN tersebut. Penafian terhadap hak undang-undang kepada seorang yang ditahan sehingga polis fikirkan ia adalah perlu untuk berbuat demikian adalah untuk mencapai tujuan peruntukan-peruntukan yang membenarkan ketidakdedahan fakta-fakta.

Seorang yang ditahan di bawah AKDN tersebut boleh mendapat hak undang-undang hanya apabila ia tidak campur tangan dengan penyiasatan polis. Berdasarkan fakta-fakta berikut, tindakan polis dalam menafikan pemohon hak undang-undang adalah menurut undang-undang. Walaupun jika pemohon telah dinafikan hak undang-undang secara tidak sah, ia tidak mempunyai apa-apa kaitan ke atas permohonan tersebut di hadapan mahkamah (lihat ms 514A, C, H, I–515A).

(13) Wujud satu nexus yang tidak boleh dipisahkan antara s 8(1) dan s 73(1) AKDN tersebut. Penangkapan dan penahanan di bawah s 73(1) ditangguh sementara menunggu siasatan untuk melihat jika Menteri patut membuat satu perintah di bawah s 8(1). Dengan mengambil kira tujuan AKDN tersebut dan peranan mahkamah-mahkamah di dalam kes-kes penahanan pencegahan, sekatan mengenai hak kajian semula kehakiman mempunyai kepentingan yang lebih dalam kes s 73(1) daripda s 8(1) AKDN tersebut. Parlimen dengan jelas berhasrat agar s 8(1) AKDN tersebut terpakai kepada s 73(1) AKDN tersebut. Walaupun kesan s 8B(1) AKDN tersebut, antara lain, bermaksud bahawa penggunaan Menteri tentang budi bicara tidak boleh dicabar, ia mestilah walaupun demikian menunjukkan bahawa budi bicara digunakan menurut AKDN tersebut. Ini adalah pengesahan ujian subjektif dengan beban yang dilemparkan ke atas Menteri tersebut untuk menunjukkan bahawa penahanan tersebut dibuat dengan penggunaan kuasa yang sah. Oleh itu, beban tersebut beralih kepada orang yang ditahan untuk menunjukkan abhawa penggunaan kuasa tersebut adalah mala fide. Bidang kuasa mahkamah tentang perkara-perkara mala fide tidak dikecualikan (lihat ms 517A–B, H–I, 518E–G); *Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 3 MLJ 265 tidak diikut; *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 diikut.

Obiter:

Apa yang undang-undang boleh dan hendaklah atau sepatutnya jadi adalah sebahagian daripada satu siasatan atau kajian bagi tujuan cadangan-cadangan untuk keputusan-keputusan polisi yang membawa kepada perubahan undang-undang. Inilah bidang kuasa politik. Sebaliknya, mahkamah terbatas dalam kewajipannya untuk memastikan apakah undang-undang dan pemakaian yang sepadan terhadapnya. Ia tidak mampu, maupun patut membolehkannya, nikmat yang lebih daripada itu (lihat ms 512H).]

Notes

For cases on preventive detention generally, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1096–1286.

Cases referred to

Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1984] 1 MLJ 67 (refd)
Bhimsen v State of UP AIR 1955 SC 435 (refd)
Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals [1989] 1 MLJ 69 (refd)
CS Appa v MP Maricar AIR 1918 LB 36 (2) (refd)
Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935 (refd)
Dew & Ors State (1963) 1 Cri LJ 543 (refd)
Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116 (refd)
Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 (refd)
Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1993] 3 MLJ 265 (not folld)
Lee Mau Seng v Minister for Home Affairs, Singapore & Anor [1971] 2 MLJ 137 (refd)
Liew Sai Wah v Public Prosecutor [1968] 2 MLJ 1 (refd)
Ong Yew Teck, Re [1960] MLJ 67 (refd)
Ooi Ah Phua v Officer-in-Charge, Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 (refd)
Public Prosecutor v Dato'Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors [1959] 3 All ER 1 (refd)
R v Almon (1765) Wilm 243 (refd)
RC Cooper S Union of India (1970) 2 SCC 2 SCC 298 (refd)
Rex v Halliday [1917] AC 260 (refd)
Secretary of State v Mask & Co AIR 1940 PC 105 (refd)
Tan Sri Raja Khalid bin Raja Harun, Re; Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 (folld)
Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 29 (refd)
Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia [1975] 2 MLJ 279 (refd)
Zamora, The [1916] 2 AC 77 (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 7C
Federal Constitution arts 5(3), 9, 10, 149, 151(3)
Human Rights Commission Act 1999 ss 2(d), 4(4)
Internal Security Act 1960 ss 8(1), 8B(1), 16, 73(1)(a), (b), (3), (7)
Universal Declaration of Human Rights 1948 art 29(2)

Zainur Zakaria (*R Sivarasa, Kamarul Hisham Kamarudin* and *Saiful Izham Ramli* with him) (*Daim & Gamany*) for the applicants.

Abdul Gani Patail (*Mohd Yusof bin Zainal Abiden, Abdul Karim bin Abdul Jalil, Kamaludin Mohd Said, Vong Poh Fah* and *Abdul Rasid bin Sudin* with him) (Attorney General's Chambers) for the respondent.

Augustine Paul J:. On 10 and 11 April 2001, the police arrested and detained seven reformasi activists under s 73(1) of the Internal Security Act 1960 ('the ISA'). On 11 April 2001, the Inspector-General of Police ('the respondent') issued a press statement. It reads as follows:

KENYATAAN AKHBAR MENGENAI PENANGKAPAN DI BAWAH AKTA KESELAMATAN DALAM NEGERI 1960 ('AKDN')

Pada 10 dan 11 April 2001, pihak polis telah menangkap dan menahan 7 orang aktivis reformasi di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('AKDN'). Mereka yang ditangkap dan ditahan adalah:

1.1 Mohamad Ezam bin Mohd Nor – 34 tahun;
1.2 Chua Tian Chang – 37 tahun;
1.3 Nisamuddin bin Md Rais atau Hishamuddin Rais – 50 tahun;
1.4 Saari bin Sungib – 43 tahun;
1.5 Gobalakrishnan a/l Nagapan – 41 tahun;
1.6 Raja Petra Raja Kamarudin – 49 tahun; dan
1.7 Abdul Ghani bin Haroon – 36 tahun

2 Tangkapan dan penahanan ini dilakukan kerana terdapat maklumat-maklumat mengenai penglibatan mereka dalam kegiatan yang boleh memudaratkan keselamatan negara. Pihak polis perlu menjalankan siasatan yang rapi di atas maklumat-maklumat tersebut. Kegiatan reformasi yang bermula pada bulan September 1998 merancang untuk menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran dan bersiap-sedia untuk bertindak secara militan dengan mengambil beberapa pendekatan seperti berikut:

2.1 Telah melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan 'grenade launcher';

2.2 Menggunakan 'molotov cocktail', 'ball bearing' serta berbagai-bagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan keadaan huru hara semasa demonstrasi jalanan di sekitar Kuala Lumpur pada bulan Oktober 1998; dan

2.3 Mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan supaya menyertai gerakan mereka.

3 Bagi membendung trend militan gerakan reformasi tersebut maka pihak polis telah mengambil tindakan ke atas 28 orang aktivis reformasi di bawah s 73(1) AKDN 1960 antara 20 September 1998 hingga 24 Disember 1998. Tindakan-tindakan pihak polis tersebut telah dapat meredakan keadaan buat sementara waktu.

4 Pada pertengahan tahun 1999, aktivis gerakan reformasi muncul kembali dengan berselindung di sebalik platform sebuah parti politik di mana sebilangan daripada mereka telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu-isu keagamaan dan perkauman. Ini termasuk penyebaran berita-berita palsu yang menggemparkan seperti dakwaan bahawa ramai orang Melayu telah dikristiankan semasa Pilihanraya Kecil Lunas. Ciri-ciri militan semasa

Pilihanraya Kecil itu telah juga dilakukan oleh aktivis reformasi melalui perbuatan ganas dengan mengancam, mengugut dan menakutkan-nakutkan para pengundi serta orang ramai.

5 Pada akhir tahun 2000, aktivis reformasi telah membuat ketetapan untuk menggunakan dua pendekatan berikut bagi mencapai matlamat mereka:

5.1 Akan terus melibatkan diri dalam proses demonstrasi yang normal serta sistem pilihanraya; dan

5.2 Melalui cara-cara di luar perlembagaan dengan mencetuskan demonstrasi jalanan secara besar-besaran dan bercorak militan menjelang Pilihanraya Umum 2004.

6 Ke arah merealisasikan perancangan tersebut, satu kumpulan sulit yang dianggotai oleh lebih kurang 20 orang aktivis reformasi telah diwujudkan di Kuala Lumpur. Sejak 6 Januari 2001 hingga 4 April 2001, sebanyak 12 perjumpaan sulit telah diadakan oleh kumpulan ini bagi merancang untuk mempengaruhi rakyat membudayakan demonstrasi jalanan dan perhimpunan kaum secara militan. Antara perancangan terpenting gerakan reformasi dalam masa yang terdekat ini adalah untuk menganjurkan demonstrasi jalanan yang dipanggil 'Black 14' secara besar-besaran di Kuala Lumpur pada 14 April 2001. Bagi mengelirukan pihak keselamatan, perhimpunan tersebut dipanggil 'Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia' di mana mereka merancang untuk mengumpulkan seramai lebih kurang 50,000 orang yang akan berhimpun di sekitar Kuala Lumpur. Perhimpunan serta perarakan ini berpontensi menjadi rusuhan.

7 Adalah jelas aktivis reformasi sanggup melaksanakan kegiatan-kegiatan di luar perlembagaan dan undang-undang demi mencapai matlamat mereka. Oleh itu, tindakan di bawah s 73(1) AKDN 1960 diambil kerana pihak Polis mempercayai ada alasan-alasan untuk menahan mereka di bawah s 8 AKDN 1960 kerana telah bertindak dengan cara yang memudaratkan keselamatan negara.

On 13 April 2001, five of the persons detained, namely, Mohamad Ezam bin Mohd Nor ('the applicant'), Chua Tian Chang, Hishamuddin Rais, Saari bin Sungib and Raja Petra bin Raja Kamarudin filed a motion for the issue of a writ of habeas corpus to secure their release. At the hearing of the motion before me it was agreed by the parties that arguments will be based on the motion of the applicant with the result binding on the other motions.

The motion of the applicant was supported by an affidavit affirmed by his wife, Bahirah bte Tajul Aris, the material parts of which read as follows:

Saya, Bahirah bte Tajul Aris (No KP 701229–10–5428) seorang warganegara Malaysia yang beralamat di No 24 Jalan SS7/24, Kelana Jaya, 47301 Petaling Jaya, Selangor Darul Ehsan cukup umur, dengan sesungguhnya berikrar dan menyatakan seperti berikut:

1 Saya adalah isteri kepada pemohon yang dinamakan di atas.

2 Saya mempunyai pengetahuan berkenaan fakta-fakta dan keadaan-keadaan berhubung dengan perkara ini kecuali di mana dinyatakan sebaliknya.

3 Responden adalah Ketua Polis Negara, Malaysia.

4 Saya telah membaca di surat khabar-surat khabar bertarikh 11 April 2001 bahawa suami saya Mohamad Ezam bin Mohd Nor telah ditangkap oleh

pengkhidmat responden di bawah Akta Keselamatan Dalam Negeri. Ini telah disahkan oleh kenyataan akhbar oleh responden yang dibuat pada hari Rabu, 11 April 2001.

5 Saya membuat afidavit ini bagi pihak pemohon kerana beliau adalah dalam tahanan dan tidak dapat mengikrar dan memfailkan afidavitnya sendiri.

6 Saya tidak mengetahui tempat di mana pemohon ditahan.

7 Saya telah pergi ke Bukit Aman pada pagi hari Rabu, 11 April 2001 dan telah membuat pertanyaan kepada wakil responden DSP Joon tentang tempat tahanan pemohon namun tidak diberitahu tempat tahanan tersebut.

8 Saya juga telah pergi ke Bukit Aman pada pagi hari Rabu, 11 April 2001 dan telah membuat permintaan kepada wakil responden DSP Joon supaya diberi peluang berjumpa dengan orang tahanan untuk memastikan keselamatan beliau dan juga supaya orang tahanan diberi peluang untuk berjumpa dengan peguam beliau. Saya diberitahu oleh wakil responden bahawa semua orang tahanan tidak akan dibenarkan berjumpa dengan peguam dan bahawa lawatan oleh keluarga tidak akan dibenarkan buat masa sekarang.

9 Saya telah arahkan peguamcara Tetuan Daim & Gamany untuk menulis kepada responden untuk meminta berjumpa dengan pemohon. Sesalinan benar surat tersebut bertarikh 12 Mac 2001 sekarang ditunjuk kepada saya dan bertanda 'BTA-1'. Sehingga sekarang, tidak ada sebarang jawapan daripada pihak responden.

10 Saya telah mendapat maklumat daripada laporan-laporan yang dibuat oleh pertubuhan hak-asasi tentang keadaan di dalam tahanan seperti berikut:

a tahanan ISA ditahan dalam bilik-bilik asingan (solitary confinement) dan tidak dibenarkan berhubung dengan orang lain kecuali pegawai polis;

b hak untuk berhubung dengan peguam dan keluarga, dan untuk menerima bahan membaca, yang diberikan di bawah Kaedah-Kaedah Lokap LN 328/1958 tidak dipatuhi;

c orang tahanan disoalsiasat dalam keadaan yang (oppressive) untuk masa yang terlalu panjang dan berterusan;

d orang tahanan diseksa secara mental dan fizikal dalam proses soal-siasat.

Ekoran dari maklumat ini, saya bimbang tentang keselamatan pemohon dan percaya dengan sesungguhnya bahawa lawatan oleh keluarga dan peguam kepada pemohon adalah perlu untuk memastikan bahawa beliau adalah dalam keadaan selamat.

11 Saya diberi sesalinan akhbar bertarikh 11 April 2001 bertajuk 'Kenyataan Akhbar Mengenai Penangkapan di bawah Akta Keselamatan Dalam Negeri 1960 ('AKDN') yang dikeluarkan oleh responden kononnya sebagai alasan untuk tangkapan dan tahanan pemohon dan enam orang lain. Sesalinan benar kenyataan akhbar tersebut ditunjuk kepada saya bertanda 'BTA-2'.

12 Kenyataan akhbar itu menuduh bahawa pemohon terlibat dalam kegiatan yang boleh memudaratkan keselamatan negara dan telah bertindak secara militan dengan mengambil pendekatan seperti berikut:

a telah melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan 'grenade launcher'.

b menggunakan 'molotov cocktail', 'ball bearing' serta berbagai-bagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan keadaan huru hara semasa demonstrasi jalanan di sekitar Kuala Lumpur pada bulan Oktober 1998; dan

c mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan serta menyertai gerakan mereka.

Kenyataan akhbar juga menuduh bahawa pemohon telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu keagamaan dan perkauman.

13 Saya berkata bahawa semua pengataan-pengataan ini dan tuduhan-tuduhan lain dalam eks 'BTA-2' adalah tidak benar dan adalah pembohongan yang dibuat oleh pihak responden dengan niat mala fide yang bermotif politik. Pendirian saya disokong oleh kenyataan akhbar oleh Presiden Parti Rakyat Malaysia, Dr Syed Husin Ali bertarikh 11 April 2001 bertajuk 'Police tell lies to save Prime Minister'. Sesalinan benar kenyataan akhbar tersebut ditunjuk kepada saya bertanda 'BTA-3'.

14 Di dalam kenyataan akhbar oleh pihak responden, juga disebut bahawa pemohon telah merancang perhimpunan haram yang militan pada 14 April 2001. Ini juga ada satu pembohongan. Saya telah diberi surat-suratan di antara Jawatankuasa Memorandum Rakyat 14 April dan pihak SUHAKAM (Suruhanjaya Hak Asasi Manusia Malaysia) di mana adalah jelas bahawa perhimpunan itu bertujuan untuk menghantar satu memorandum kepada SUHAKAM. Jawatankuasa itu telah secara telus dan bersopan telah mengaturkan satu appointment dengan SUHAKAM untuk penyerahan itu, Sesalinan benar surat-suratan ini bertarikh 30 Mac dan 11 April ditunjuk kepada saya bertanda 'BTA-4'.

15 Pihak SUHAKAM telah juga mendesak bahawa semua tahanan termasuk pemohon dibebaskan dengan serta merta tanpa syarat dan sekiranya disyakki melakukan apa-apa kesalahan undang-undang, dituduh di mahkamah yang sesuai. Sesalinan surat dari SUHAKAM tersebut bertarikh 11 April 2001 ditunjukkan kepada saya bertanda 'BTA-5'.

16 Saya dinasihati oleh peguamcara saya dan pemohon, Tetuan Daim dan Gamany, bahawa tangkapan pemohon pada mulanya dan/atau penahanannya kini dan berterusan adalah tidak sah dan salah di sisi undang-undang serta mala fide atas alasan-alasan yang berikut:

a Pencabulan hak pemohon di bawah perkara 5(3) Perlembagaan Persekutuan iaitu keengganan responden atau pengkhidmat responden untuk membenarkan pemohon berjumpa dengan peguam dan/atau ahli keluarga adalah berjumlah kepada penindasan dan penafian hak pemohon untuk memastikan samada sebab-sebab penangkapan beliau telah dijelaskan dengan tepat semasa tangkapan dan/atau di dalam Perintah Tahanan, dan sekaligus menafikan hak beliau untuk mencabar kesahihan tangkapan beliau;

b Pencabulan hak pemohon di bawah perkara 5(2) Perlembagaan Persekutuan;

c Tangkapan dan penahanan pemohon telah melanggar undang-undang, adalah tidak rasional (irrational), satu tindakan yang sewenang-wenang (arbitrary) dan tidak munasabah (unreasonable):

e Tangkapan dan penahanan pemohon adalah mala fide dan bermotif politik.

17 Maka, saya dengan segala hormatnya memohon suatu perintah seperti yang dipohon di daiam perenggan 1 dalam notis usul atau apa-apa perintah lain atau selanjutnya yang difikir patut dan wajar oleh mahkamah yang mulia ini.

The respondent himself affirmed two affidavits. The material parts of his first affidavit read as follows:

Saya, Tan Sri Norian bin Mai, Nombor Polis G/5189, seorang warganegara Malaysia yang cukup umur dan beralamat di No 19 Jalan Terusan, Seksyen 8/26, 84000 Shah Alam, Selangor dengan sesungguhnya berikrar dan menyatakan seperti berikut:

1 Saya adalah Ketua Polis Negara bertugas di Ibu Pejabat Polis Bukit Aman, Kuala Lumpur.

2 Saya berhak membuat afidavit ini dan mempunyai pengetahuan berkenaan fakta-fakta dan keadaan-keadaan berhubung dengan perkara ini kecuali di mana dinyatakan sebaliknya,

3 Saya merujuk kepada afidavit Puan Basirah bte Tajul Aris yang diikrarkan pada 12 April 2001 ('Afidavit Basirah') berkaitan dengan tahanan bernama Mohamad Ezam Mohd Nor ('pemohon') dan mengatakan bahawa daripada maklumat yang diterima berhubung dengan kegiatan pemohon, saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan pemohon ditahan di bawah s 8 Akta Keselamatan Dalam Negeri 1960 kerana pemohon telah bertindak dengan cara yang boleh memudaratkan keselamatan Malaysia.

4 Saya merujuk kepada perenggan 10 Afidavit Basirah dan saya menyatakan bahawa perkara-perkara yang dinyatakan di perenggan itu tidak merujuk secara khusus terhadap tahanan pemohon dan merupakan dengar cakap (hearsay).

5 Saya mengesahkan bahawa saya telah membuat kenyataan akhbar mengenai penangkapan di bawah Akta Keselamatan Dalam Negeri 1960 berkaitan dengan tangkapan pemohon dan enam orang yang lain pada 11 April 2001. Kenyataan akhbar saya adalah seperti dilampirkan di dalam Afidavit Basirah dan ditanda sebagai eks 'BTA-2'.

6 Saya merujuk kepada perenggan 12 Afidavit Basirah dan saya menyatakan bahawa kegiatan-kegiatan yang dimaksudkan itu tidak merujuk secara khusus kepada pemohon tetapi merujuk kepada 'Gerakan Reformasi yang mana pemohon adalah seorang ahli aktivist gerakan berkenaan.

7 Saya menafikan segala dakwaan-dakwaan yang terkandung di dalam perenggan 13 Afidavit Basirah dan menyatakan bahawa penangkapan pemohon bukan berniat mala fide yang bermotif politik tetapi adalah berkaitan dengan kegiatan pemohon yang boleh menggugat keselamatan negara.

8 Dakwaan-dakwaan yang terkandung di dalam perenggan 14 Afidavit Basirah adalah tidak benar dan dinafikan. Saya dengan sesungguhnya

mempercayai bahawa perkara-perkara yang didakwakan olehnya adalah di luar pengetahuannya dan selanjutnya saya mengulangi apa yang saya telah katakan di dalam perenggan 6 kenyataan akhbar saya yang bertarikh 11 April 2001.

9 Saya mengambil maklum tentang perenggan 15 Afidavit Basirah dan menyatakan bahawa penangkapan pemohon adalah dibawah undang-undang pencegahan di mana pihak polis diberi kuasa untuk mengambil tindakan.

10 Semua pengataan-pengataan di dalam Perenggan 16 adalah dinafikan dan saya dengan sesungguhnya mempercayai bahawa tangkapan dan penahanan pemohon adalah sah kerana telah dibuat menurut peruntukan undang-undang. Oleh yang demikian, saya memohon supaya permohonan pemohon ditolak.

The material parts of his further affidavit read as follows:

Saya, Tan Sri Norian bin Mai, Nombor Polis G/5189, seorang warganegara Malaysia yang cukup umur dan beralamat di No 19 Jalan Terusan, Seksyen 8/26, 84000 Shah Alam, Selangor dengan sesungguhnya berikrar dan menyatakan seperti benkut:

1 Saya adalah Ketua Polis Negara bertugas di Ibu Pejabat Polis Bukit Aman, Kuala Lumpur.

2 Saya berhak membuat afidavit ini dan mempunyai pengetahuan berkenaan fakta-fakta dan keadaan-keadaan berhubung dengan perkara ini kecuali di mana dinyatakan sebaliknya.

3 Saya merujuk kepada Afidavit Jawapan saya yang diikrarkan pada 15 April 2001 dan difailkan pada 16 April 2001 saya sesungguhnya menyatakan daripada maklumat yang diterima berhubung dengan kegiatan orang tahanan bernama Mohamad Ezam bin Mohd Nor ('pemohon') saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan pemohon ditahan di bawah s 8 Akta Keselamatan Dalam Negeri 1960 (Akta 82).

4 Saya mempercayai bahawa butir-butir maklumat yang diterima dan siasatan terperinci yang sedang dijalankan berhubung kegiatan-kegiatan pemohon selain daripada maklumat yang dinyatakan di dalam kenyataan akhbar saya yang bertarikh 11 April 2001, tidak boleh diberitahu dan didedahkan kerana saya mempunyai sebab untuk mempercayai bahawa dengan berbuat demikian, ia adalah bertentangan dengan kepentingan keselamatan Malaysia.

I shall refer to other affidavits filed on behalf of the respondent in the course of the judgment.

Application to disqualify

At the commencement of the proceedings, En Sivarasa, one of the counsel for the applicant, urged me to consider whether I should recuse myself from hearing this case. In substance, his application was grounded on the fact that I was the judge who heard the case involving Dato' Seri Anwar bin Ibrahim, the conviction and sentence of which was handed down on 14 April 1999 (see *Public Prosecutor v Dato'Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1). This is the date that is referred to as 'Black 14' in the press

A statement of the respondent. He said that the conviction and sentence was the subject matter of strong public criticism including the Bar Council. He added that although there is no assertion of actual bias, there may be a perception of bias as the facts are in the public domain. In opposing the application, Dato Abdul Gani Patail, Senior Deputy Public Prosecutor, said that the press statement of the respondent does not refer to the judgment of B 14 April. He then said that the date does not refer to a criticism of the judgment. He explained that the reformasi movement has nothing to do with 14 April as it started in 1998. It is a bigger concept than 'Black 14'. He concluded by saying that the test of disqualification of a judge from hearing a case is the perception of a reasonable man.

C It is indeed bizarre that the date on which a judgment is delivered can develop into the focal point of a disqualification exercise. A judge in deciding a case, is merely carrying out a constitutional function entrusted upon him by the Yang di-Pertuan Agong. The decision made is based on admissible evidence and the arguments advanced by the parties. A judge has no interest in the outcome of his judgment. Any attempt made to hold a D judgment against the decider whether directly or indirectly, explicitly or implicitly or even dressed and fashioned as a perception will strike at the very core of the administration of justice and lead to the destruction of the independence of the judiciary. As *Iyer's Law of Contempt of Courts* says at p 683:

E

> By the very nature of his work a Judge has to decide matters against one or other of the parties. If the fact that he renders a decision which is resented by a litigant or his lawyer were to expose him to such risk, it will sound the death knell of the institution.

As observed by Wilmot J in *R v Almon* (1765) Wilm 243 at p 255:

F

> The arraignment of the justice of the judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in his choice of his judges and, excites in the mind of his people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal an most dangerous obstruction of justice ...

G

In fact, questioning the competence of a judge to hear a particular case on account of his standing in the judicial hierarchy amounts to casting an aspersion on the appointing authority (see *Devi & Ors v State* (1963) 1 Cri LJ 543). It is the bounden duty of all concerned, including the Bar Council to protect the judiciary from such onslaughts. Be that as it may, fair criticism H of a judgment is a part of the judicial process. A court cannot claim to be always right and must accept criticisms. As Hidayatullah CJ said in *RC Cooper v Union of India* (1970) 2 SCC 298 at p 301:

> There is no doubt that the court like any other institution does not enjoy immunity from fair criticism. This court does not claim to be always right I although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them it is so

> far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned counsel, he is apt to avoid mistakes more than others. We are constrained to say also that while fair and temperate criticism of this court or any other court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of courts, is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril.

A criticism can be said to be fair, even if wrong, if it is based on a legal analysis of the issues decided in a case, it is superfluous to state that this necessitates a perusal of the judgment. Sadly, criticisms of judgments are not fair in all cases. In some cases, they may be done without a perusal of the judgment and may even be made for an improper motive. A criticism cannot be fair when it is built upon facts which are not truly stated (see *CS Appa v MP Maricar* AIR 1918 LB 36 (2)). It will also be so when it is based mostly on surmises or unauthorized versions furnished by interested parties. It must be observed that in politically-charged cases, criticisms are inevitable. In such cases, the need for self-preservation and maintenance of popular support overshadow all other interests. Thus, in such instances, as stated by a judge of the United States Supreme Court in the course of hearing the recent Bush-Gore post election legal dispute which was preceded by attacks on the judiciary, the ultimate loser is the court. It is the ability of the court to withstand such attacks that makes it truly independent.

The category of criticism into which the judgment delivered on 14 April falls is not for me to analyse especially when particulars were not furnished to me and more so when it is pending appeal in the Federal Court. In any event, as observed in *Iyer's Law of Contempt of Courts* at p 172:

> It should be well to remember that the judges by reason of their office are precluded from entering into any controversy in the columns of the public press, nor can they enter the arena and do battle upon equal terms in newspapers, as can be done by ordinary citizens.

'Black 14' is undoubtedly a date to commemorate the delivery of the judgment on 14 April. It has nothing to do with the merits or demerits of the judgment that was delivered. The proper test to be applied in the application made before me, as I intimated to learned counsel, is this: If I were to dismiss the applications pending hearing, would a reasonable person conclude that I am anti-reformasi? There was no response to this question from learned counsel. If the answer to the test is in the affirmative, it is appropriate that I recuse myself from hearing the case. Such a perception can be said to be reasonable if, in my judgment of 14 April, I had made unnecessary comments on the reformasi movement. A perusal of the judgment will reveal that there is absolutely no reference whatsoever to the

movement in the judgment. In the premises, I was satisfied that the application made before me was frivolous, vexatious and an abuse of the process of the court. Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case, it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact, it would be a gross dereliction of duty for a judge to disqualify himself when there are no grounds. Accordingly, I dismissed the application.

I then proceeded to hear the submissions of both parties which, I must say, was done in a polite and professional manner. I shall now consider the arguments advanced before me. I find that it is not necessary for me to expound my views on the law relating to preventive detention as it has been adequately dealt with by the highest court in the land through the minds of legal luminaries such as Suffian LP and Salleh Abas LP.

The law

Preventive detention is not new and unique nor peculiar to Malaysia. As Lord Atkinson said in *Rex v Halliday* (1917) AC 260 at p 273:

> Preventive justice, as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England.

In appreciating the law contained in the ISA, it is appropriate to bear in mind the fact that the judges in the 'matter of preventive detentions relating to the security of Malaysia are the executive (see *Theresa Lim Chin Chin & Ors v Inspector-General of Police* [1988] 1 MLJ 293). The judicial process is unsuitable for reaching decisions on national security (see *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935). As Lord Parker said in *The Zamora* (1916) 2 AC 77 at p 107:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

It is therefore not the function of the court to act as a court of appeal from the discretionary decision of the executive and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold a person in detention (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129). Thus, the role of the courts in such matters is limited as made clear by decided cases. Section 73(1) of the ISA deals with the power of the police to arrest and detain persons who come within the subsection. Section 8(1) of the ISA deals with the ministerial power to issue an order of detention. The test to determine the validity of a detention order made under s 8(1) of the ISA is subjective (see *Karam Singh*'s case). As s 73(1) and s 8(1) of the ISA are so inextricably connected, the subjective text should be applied to both (see *Re Tan Sri Raja Khalid bin Raja Harun;*

Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182). The result is that the court cannot require a police officer to prove to the court the sufficiency of the reason for his belief under s 73(1) of the ISA. As Suffian FJ (as he then was) said in *Karam Singh*'s case at p 150:

> ... when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation.

In commenting on the case that I have just referred to Edgar Joseph Jr J (as he then was) said in *Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1984] 1 MLJ 67 at p 69:

> In my opinion, as Suffian FJ had made it clear that he was deciding the case on more than one ground, each proposition on which he based his decision may be rightly regarded as the *ratio decidendi* of his judgment. Accordingly, the proposition that the subjective satisfaction of the Minister in cases of preventive detention is not justiciable, qualifies as one of the *ratio decidendi* of his judgment.

The court may however, examine the sufficiency of the reasons for detention under s 73(1) of the ISA in certain circumstances which I shall consider in the succeeding paragraph. Be that as it may, the subjective nature of the reasons for detention does not mean that an order of detention cannot be challenged. It can be challenged on the ground that it was made mala fide. Thus, in commenting on the burden of proof upon a challenge made to an order of detention Salleh Abas LP said in *Re Tan Sri Raja Khalid bin Raja Harun*'s case at p 186:

> Where a person who has been deprived of his liberty challenges the detention, it is for the authority to show that the person has been detained in exercise of a valid legal power.

Once that is shown, it is for the detainee to show that the power has been exercised mala fide or improperly, which means that it is made for a 'collateral' or 'ulterior' purpose, that is to say, a purpose other than those set out in art 149 of the Federal Constitution ('the Constitution'), and in this case for a purpose other than for preventing the detainee from doing acts prejudicial to the security of Malaysia (see *Karam Singh*'s case. As Ali FJ said in the same case at p 157:

> In my opinion, mala fide is accepted as a good ground for challenging the validity of order of detention because it suggests an abuse of power. Being a question of fact, it has to be proved and in cases of this nature, it is not always easy to prove it.

The burden is shifted to the detainee because s 73(7) of the ISA provides that a person detained pursuant to the powers conferred shall be deemed to be in lawful custody.

With regard to the obligation of a police officer or the minister to disclose facts in connection with a detention, s 16 of the ISA and art 151(3) of the Constitution provide that they cannot be required to furnish facts whose disclosure would in their opinion be against the national interest. Both the provisions read as follows:

Section 16 of the ISA

> Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.

Article 151(3) of the Constitution

> This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

The scope of s 16 is not limited to Chapter II where it appears but also extends to s 73(1) which is in Chapter VI of the ISA (see *Theresa Lim Chin Chin*'s case). Since the right of non-disclosure applies only to facts whose disclosure would be against the national interest, there can be disclosure of facts which are not against such interest. As the right is that of the authority concerned it may, in an appropriate case, waive the right. It follows that in a particular case, there can be partial disclosure and partial non-disclosure of facts. Needless to say, the right of partial disclosure is for the detaining authority to decide. It is the right of non-disclosure that makes the test under ss 8(1) and 73(1) of the ISA a subjective one as in the absence of any disclosure, the court would be in no position to make a ruling on the validity of the arrest and detention. I shall now return to the circumstance in which the court may examine the sufficiency of the reasons for detention under s 73(1) of the ISA to which I had made reference in the preceding paragraph. It arises when the facts of a case are furnished voluntarily, exhaustively and in great detail by the detaining authority for the consideration of the court in which event the court may make its own evaluation and assessment to come to a reasonable conclusion (see *Re Tan Sri Raja Khalid bin Raja Harun*'s case). The right to make an evaluation in such circumstances means that the test would be an objective one. It is superfluous to state that this procedure cannot be resorted to if the facts furnished voluntarily are not exhaustive and are not in great detail. In other words, the police must have disclosed all material facts in their possession. In any event, the disclosure must be unqualified. Thus, if the detaining authority has made a partial disclosure with a right of non-disclosure asserted over the other part this procedure will be of no avail with the result that the test to determine the validity of the arrest and detention will be the subjective one. In that event, the detainee must show that the detention is mala fide. At the end of the judgment, I shall consider the applicability of s 8B(1) to s 73(1) of the ISA as an alternative answer to the remedy sought by the applicant.

Whether the respondent has discharged the burden to show that the applicant has been detained in the exercise of a valid legal power

The right of a police officer to arrest and detain a person is contained in s 73(1) and (3) of the ISA which read as follows:

> (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe —
> (a) that there are grounds which would justify his detention under s 8; and
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that —
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

In order to discharge the burden to show that the applicant was arrested and detained in the exercise of a valid legal power, the respondent filed three affidavits. The first affidavit was affirmed by Ahmad Ramdzan bin Daud ('the arresting officer'), an Assistant Superintendent of Police attached to the Special Branch, Police Headquarters, Bukit Aman, Kuala Lumpur. He deposed in para 6 of his affidavit that on 10 April 2001 at 4.35pm, he led a police party to arrest the applicant at Terminal 3, Sultan Abdul Aziz Shah Airport, Subang, Selangor. The material parts of his affidavit then go on to state as follows:

> 4 Saya dengan sesungguhnya menyatakan daripada maklumat yang diterima berhubung dengan kegiatan orang tahanan bernama Mohamad Ezam bin Mohd Nor ('pemohon'). Saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan pemohon ditahan dibawah s 8 Akta Keselamatan Dalam Negeri 1960 (Akta 82).
>
> 5 Saya juga sesungguhnya mempercayai pemohon telah bertindak dengan cara yang boleh memudaratkan keselamatan negara.
>
> 7 Sebaik sahaja saya menangkap pemohon, saya telah memberitahu dan menerangkan kepada pemohon dalam Bahasa Melayu yang mudah sebab-sebab pemohon ditangkap. Saya sesungguhnya mempercayai pemohon telah memahami penerangan saya.

> 8 Pada masa tangkapan, saya tidak memberitahu butir-butir maklumat yang diterima dan siasatan yang dijalankan berhubung kegiatan-kegiatan pemohon kerana saya mempunyai sebab mempercayai bahawa dengan berbuat demikian ia adalah bertentangan dengan kepentingan keselamatan Malaysia. Saya kemudiannya telah menahan pemohon untuk tujuan penyiasatan lanjut, di bawah Akta Keselamatan Dalam Negeri 1960 (Akta 82).

The other two affidavits relate to the authority of the police to detain the applicant. One was affirmed by Wong Lang Eng, an Inspector attached to the Special Branch, Police Headquarters, Bukit Aman, Kuala Lumpur. The material parts of her affidavit read as follows:

> 3 Pada 11 April 2001, jam 2.00 petang, saya telah memberi kuasa penahanan ke atas orang tahanan bernama Mohamad Ezam bin Mohd Nor KP 670424–10–6267 ('pemohon') dilanjutkan melebehi 24 jam lagi mulai 11 April 2001 jam 4.35 petang, satu kuasa yang diberikan kepada saya di bawah peruntukan s 73(3)(a) Akta Keselamatan Dalam Negeri 1960 bagi tujuan meneruskan siasatan terhadap pemohon.
>
> 4 Satu salinan Borang SB Form 28A (Revised) yang memberi kuasa untuk penahanan lanjutan ke atas pemohon di bawah peruntukan s 73(3)(a) Akta Keselamatan Dalam Negeri 1960 yang telah disahkan oleh Superintenden Polis Shamsuddin bin Hj Arshad, Nombor Polis G/5199, seorang Pegawai Kanan Polis yang memegang jawatan sebagai Pegawai Turus E6B di Cawangan Khas, Ibu Pejabat Polis DiRaja Malaysia, Bukit Aman, Kuala Lumpur yang mempunyai di dalam jagaannya dokumen tersebut, dilampirkan sebagai eks 'WLR-1'.

The material part of the exh 'WLE-1' referred to in para 4 of the affidavit reads as follows:

> Whereas I, Wong Lang Eng, Inspector of Police, of Police Headquarters Bukit Aman am satisfied with regard to the case of Mohamad Ezam bin Mohd Nor NRIC No 670424–10–6267 who was arrested under s 73(1) of the Internal Security Act, 1960 on 10 April 2001 @ 1635 Hrs In Terminal 3, Subang Airport, Subang, Selangor that the necessary enquiries cannot be completed within the period of 24 hours, now therefore, In exercise of the powers vested in me by s 73(3)(a) of the Internal Security Act 1960, I hereby authorize the further detention of the abovenamed Mohamad Ezam bin Mohd Nor for an additional period of 24 hours with effect from 11 April 2001 at 1635 hrs.

The other affidavit was affirmed by Cheah Kee Sam, an Assistant Superintendent of Police attached to the Special Branch, Police Headquarters, Bukit Aman, Kuala Lumpur. The material parts of his affidavit read as follows:

> 3 Pada 12 April 2001, jam 3.35 petang, saya telah memberi kuasa penahan ke atas orang tahanan bernama Mohamad Ezam bin Mohd Nor (K/P No 670424–10–6267) ('pemohon') dilanjutkan selama 28 hari lagi di bawah peruntukan s 73(3)(b) Akta Keselamatan Dalam Negeri 1960 mulai 12 April 2001 jam 4.35 petang untuk siasatan selanjutnya kerana siasatan terhadap pemohon tidak dapat disempurnakan dalam jangka masa 48 jam.

4 Satu salinan Borang SB Form 28 (Revised) yang memberi kuasa untuk penahanan lanjutan ke atas pemohon di bawah peruntukan s 73(3)(b) Akta Keselamatan Dalam Negeri 1960 yang telah disahkan oleh Superintenden Polis Shamsuddin bin Hj Arshad, Nombor Polis G/5199, seorang Pegawai Kanan Polis yang memegang jawatan sebagai Pegawai Turus E6B di Cawangan Khas, Ibu Pejabat Polis DiRaja Malaysia, Bukit Aman, Kuala Lumpur yang mempunyai didalam jagaannya dokumen tersebut, dilampirkan sebagai eks 'CKS-1'.

The material part of the exh 'CKS-1' referred to in para 4 of the affidavit reads as follows:

> Where I Cheah Kee Sam, Assistant Superintendant of Police, of Police Headquarters Bukit Aman am satisfied with regard to the case of Mohamad Ezam bin Mohd Nor (NRIC No 670424-10-6267) who was arrested under s 73(1) of the Internal Security Act 1960 on 10 April 2001 at 1635 hrs in Terminal 3, Subang Airport, Subang, Selangor that the necessary enquiries cannot be completed within the period of 48 hours, now therefore, in exercise of the powers vested in me by s 73(3)(b) of the Internal Security Act 1960, I hereby authorize the further detention of the above named Mohamad Ezam bin Mohd Nor for an additional period of 28 days with effect from 12 April 2001 at 1635 hrs.

En Kamarul Hisham, one of the counsel for the applicant, contended that the affidavits affirmed by the three police officers do not comply with the requirements of s 73(1) and (3) of the ISA. His argument was two fold. Firstly, s 73(1)(a) requires the arresting officer to set out in full the words of s 8(1) of the ISA and not merely to make a reference to the latter. This will show that he is satisfied with the requirements of s 8(1) of the ISA. Secondly, the requirements of s 73(1) of the ISA must be read into s 73(3) of the ISA, that is to say, the officer authorizing the detention must also be satisfied with the requirements of s 73(l)(a) and (b) of the ISA before making the order. In his reply, Dato Abdul Gani Patail argued that the words '... of whom he has reason to believe ... 'in s 73(1) of the ISA require a consideration of the provisions (a) and (b) of the subsection while there is no such requirement in s 73(3) of the ISA.

In my view, the objection raised by En Kamarul Hisham cannot be sustained. With regard to the first objection, it is my view that it is based on a misreading of s 73(1)(a)of the ISA. Its reference to s 8 of the ISA is only to the 'grounds' which would justify a detention. The grounds of detention are the reasons for which an order of detention is made. What is further set out in s 8 of the ISA is the purpose for which an order of detention may be made (see *Karam Singh*'s case). This is specifically required by s 73(1)(b) of the ISA. It is therefore sufficient if it is stated, as required by s 73(1)(a) of the ISA, that there are grounds which would justify a detention under s 8 of the ISA. Pursuant to s 73(1)(b) of the ISA, the specific purpose of detention must be identified. A setting out in full of the language in s 8(1) of the ISA would be fatal as it would result in the specific purpose of detention being not identified and would also render s 73(1)(b) superfluous. A more pertinent matter for consideration is whether the arresting officer must set out the grounds for his belief in effecting the arrest.

Article 151(3) of the Constitution and s 16 of the ISA allow the arresting officer to decline to disclose the grounds of his belief which was done in this case. This procedure was recognized in *Re Ong Yew Teck* [1960] MLJ 67 which was adopted by the (then) Supreme Court in *Re Tan Sri Raja Khalid bin Raja Harun's* case. As Salleh Abas LP said in the latter case at p 187:

> In simple language, what s 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under s 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code defines 'reason to believe' to mean 'sufficient cause to believe'. Who then is to decide what is sufficient cause under s 73(1) of the Act? That is the crux of the matter.
>
> We hold that since s 73(1) and s 8 of the Act are so inextricably connected, the subjective test should be applied to both. The court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s 73(1).

Thus, there is no requirement for the arresting officer to set out the reasons for his belief in effecting the arrest. With regard to the second objection, there is no express stipulation in s 73(3) of the ISA for the officer authorizing the detention to be satisfied with the requirements of s 73(1)(a) and (b) of the ISA as in the case of the arresting officer. That of course does not mean that an officer authorizing a detention may do so automatically without any consideration of the need to authorize the detention. He must be satisfied that there are reasons to justify the detention. This in effect means that he must be satisfied with the requirements of s 73(1)(a) and (b) of the ISA. However, he need not disclose the reasons. Any disclosure of the reasons would violate the right conferred by s 16 of the Act and art 151(3) of the Constitution which the arresting officer has asserted in this case.

I shall now consider whether the applicant has been arrested and detained in the exercise of a valid power. Paragraphs 4 and 5 of the affidavit of the arresting officer show that he has complied with the requirements of s 73(1)(a) and (b) of the ISA in effecting the arrest and detention of the applicant. The two further affidavits that I have referred to show that the requirements of s 73(3)(a) and (b) have been complied with in authorizing the further detention of the applicant. Both the detention orders that I have reproduced earlier show that the officers concerned have applied their mind in authorizing the detention. The reference in both the detention orders to '...am satisfied with regard to the case of Mohamad Ezam bin Mohd Nor (NRIC NO 670424–10–6267), who was arrested under s 73(1) ... that the necessary enquiries cannot be completed ...' show satisfaction with the necessary requirements.

I am therefore of the view that the applicant has been arrested and detained in the exercise of a valid legal power.

Whether the applicant has discharged the burden on him to show that the detention is unlawful

As the respondent has discharged the burden on him, the burden is now on the applicant to show that the detention is unlawful. Since the respondent

has made certain disclosures in the press statement issued by him, I will first consider whether the facts disclosed are sufficient to enable me to conduct an objective test on the validity of the arrest and detention of the applicant. As I said earlier, an objective assessment and evaluation of the press statement can be done if it is voluntary, exhaustive and in great detail. That the press statement is voluntary cannot be disputed and, in fact, is not disputed by the respondent. A matter of concern is whether it is exhaustive and in great detail. If it is not exhaustive and in great detail by virtue of certain facts being withheld from the purview of the court, then the court will be unable to conduct an objective evaluation and assessment of the facts for the simple reason that not all the facts would be before the court. In that event, the applicable test will be subjective and the validity of the arrest and detention of the applicant cannot be impugned.

In arguing that the press statement does not amount to an exhaustive and detailed disclosure, Dato Abdul Gani Patail referred to its para 2 which states that the applicant and the others were arrested and detained because there was information pertaining to their involvement in activities that may endanger the security of the country. It goes on to say that the police need to carry out a thorough investigation on the information. He said that what appears thereafter in the press statement is a reference to the reformasi movement in general and not to the persons detained. He then referred to para 4 of the further affidavit of the respondent which reads as follows:

> Saya mempercayai bahawa butir-butir maklumat yang diterima dan siasatan terperinci yang sedang dijalankan berhubung kegiatan-kegiatan pemohon selain daripada maklumat yang dinyatakan di dalam kenyataan akhbar saya yang bertarikh 11 April 2001, tidak boleh diberitahu dan didedahkan kerana saya mempunyai sebab untuk mempercayai bahawa dengan berbuat demikian ia adalah bertentangan dengan kepentingan keselamatan Malaysia.

He added that some of the facts were disclosed by the respondent in the public interest and to show transparency and that the respondent must be commended for having taken these factors into consideration. In his reply, En Zainur Zakaria, leading counsel for the applicant, contended, inter alia, that the existence of other reasons ought to have been mentioned in the press statement. He added that the references in the press statement to the reformasi movement and its activities are a reference to the persons detained as they are part of the movement. He also submitted that the two affidavits affirmed by the respondent are contradictory in that while he had asserted in the first affidavit that the allegations made in the press statement do not refer specifically to the persons detained yet in the further affidavit he says that there are other reasons in connection with the detention which cannot be disclosed.

A consideration of the exhaustiveness of the press statement must commence with para 8 of the affidavit affirmed by the arresting officer where he affirmed that at the time of the arrest of the applicant, he did not disclose the information received and investigations being carried out in connection with the activities of the applicant as he believed that such

disclosure would be against the national security of Malaysia. This, needless to say, is in accordance with the right conferred on him by s 16 of the ISA and art 151(3) of the Constitution. It is after the assertion of this right by the arresting officer that the respondent made the press statement. In the first two sentences of para 2 of the press statement, the respondent referred to information relating to the involvement of the seven persons who were detained in activities that may endanger the security of the country. He went on to say that the police need to carry out a thorough investigation on the information. What then follows is a general description of the activities of the reformasi movement. This may or may not refer to the persons detained. In determining whether paras 2.1, 2.2 and 2.3 refer to the persons detained, a reference to para 3 is necessary. It states that to curb the militant trend of the reformasi movement, the police took action on 28 reformasi activists under s 73(1) of the ISA between 20 September 1998 and 24 December 1998. In the absence of evidence to show that the persons currently detained were part of the 28 persons detained in 1998, the averment by the respondent in para 6 of his first affidavit that paras 2.1, 2.2 and 2.3 of the press statement do not refer specifically to the applicant and the other detained persons but to the reformasi movement in general, can be accepted as being logical and accurate. The remaining parts of the press statement are general in nature. Be that as it may, the first two sentences of para 2 of the press statement show in clear terms that the police must carry out a thorough investigation on the activities of the persons detained. Thus, even if the facts disclosed in the press statement can be argued to refer to the detained persons, the fact remains that the police need to carry out a thorough investigation on the activities of the persons detained based on information received. It must be noted that the press statement does not disclose the information which required a thorough investigation. It is this information and investigation being carried out which the respondent says he cannot disclose pursuant to para 4 of his further affidavit. This paragraph is a re-assertion of what has already been asserted by the arresting officer in para 8 of his affidavit and is in conformity with what has been stated by the respondent in the first two sentences of para 2 of his press statement, I am therefore unable to agree with the submission of En Zainur Zakaria that the further affidavit was affirmed by the respondent to overcome points raised by him in his submission on the press statement. I have no reason to doubt the bona fides of the respondent when he re-asserted the right of non-disclosure. In the circumstances, it is my view that the press statement does not contain an exhaustive and detailed disclosure of the facts as the specific allegations made in it do not refer to the applicant. Even if they do so, the fact that further investigation is required means that the press statement is not exhaustive. The disclosure against the applicant is therefore only partial. It follows that it is not possible for me to make an objective assessment and evaluation in order to ascertain whether the arrest and detention of the applicant is justified in the absence of the necessary facts to do so. The detention of the applicant cannot therefore be impugned based on the argument anchored on the press statement of the respondent. This does not mean that the applicant is without any further recourse. He can still show

that his detention is unlawful if he can make out a case of mala fides against the respondent. I pause to add that I agree with Dato Abdul Gani Patail that the respondent must be commended for having made the partial disclosure. He owed no duty to make such a disclosure yet he proceeded to do so. Quite obviously, he did so in the interest of the public to explain in as many words as he could the reasons for the arrest in the light of objections to the use of the ISA by certain groups and the needs of the times.

Whether the applicant has made out a case of mala fides against the respondent

This requires a consideration of whether the detention of the applicant was made in bad faith and not the sufficiency of the grounds of detention. In support of his argument on this issue, En Zainur Zakaria advanced several grounds. His first contention was that the persons responsible for the criminal acts disclosed in the press statement of the respondent ought to have been charged. He said that in the absence of any prosecution the detention of the applicant under the ISA is an act of bad faith. Bahirah bte Tajul Aris in affirming in her affidavit that the detention of the applicant is mala fide said in para 15 of her affidavit,

> Pihak SUHAKAM telah juga mendesak bahawa semua tahanan termasuk pemohon dibebaskan dengan serta merta tanpa syarat dan sekiranya disyaki melakukan apa-apa kesalahan undang-undang, dituduh di mahkamah yang sesuai.

The press statement of SUHAKAM reads as follows:

> SUHAKAM, at its special meeting today, expresses its concern over the arrest of seven persons under the Internal Security Act (ISA) as reported today.
>
> Since its inception and its first meeting on 24 April 2000, SUHAKAM has been encouraged by signals perceived by us to indicate that the Government is slowly but surely being sensitized to human rights issues and is taking concrete steps to ensure that its concern for human rights is translated into action. The formation of SUHAKAM itself is proof of this trend.
>
> It is against this backdrop that SUHAKAM expresses its deep regrets on the use of the ISA to detain the seven activists. Detention without trial constitutes a fundamental human rights violation.
>
> SUHAKAM calls on the authorities to release the seven detainees immediately. If they have committed any offence, they should be charged and tried in an open court.
>
> While SUHAKAM recognizes that the Government has, over the years, released many of those detained under the ISA, the present crackdown is cause for concern.
>
> We strongly urge the authorities to allow families, lawyers and doctors immediate access to the detainees.
>
> As a national human rights institution, SUHAKAM in accordance with s 4(2)(c) and (d) of the Human Rights Commission of Malaysia Act 1999, will seek access to the detainees in order to monitor their mental, physical and general well-being.
>
> In its current exercise of reviewing Malaysian laws that constitute infringements of human rights, in accordance with s 4(1)(b) of the same Act,

> SUHAKAM will make recommendations to the Government on the necessity of amending or repealing the Internal Security Act.

In substance, the call by SUHAKAM, in which Bahirah bte Tajul Aris sought refuge, is that the detainees should be charged and tried in an open court if they have committed any offence and that they must be released immediately. What arises for immediate consideration is whether the commission of any offence by a person warrants a prosecution and not detention as submitted by learned counsel and as advocated by SUHAKAM. This question was cogently and succinctly answered by Dato Abdul Gani Patail in his reply. In saying that it is a fallacy to say that such a person must be charged and not detained under the ISA, he referred to *Karam Singh*'s case where Ibrahim J (as he then was) said in the High Court at p 134:

> It is contended by the applicant that the allegations of fact in paras 8 and 11 in A1 are criminal in character which should have been proceded with by criminal action and their inclusion in A1 shows the lack of good faith on the part of the Cabinet in making the order.
>
> I cannot accept this contention. Detention orders are made on evidence which may not strictly be admissible or sufficient to secure a conviction in a court of law but which the law taking into consideration the needs and exigencies of administration has allowed to be considered sufficient for the subjective decision of the authority. The mere fact that those two allegations are criminal in character therefore is not evidence of the lack of good faith on the part of the Cabinet in making the order.

In the Federal Court, in that case, Azmi LP said at p 138:

> In India it has been held in *Jhala Jorubha v The State* AIR 1952 Saurashtra EC 12 that whether a person should be prosecuted under the ordinary law or the Government should exercise their powers under the Preventive Detention Act is for the authorities to decide. At p 14 of the report Shah CJ in his judgment says this:
>
> > 'The authorities have laid down that the powers of the detaining authority are very wide under the law as it exists today. Government may detain a person even though the grounds clearly disclose that he could have been prosecuted under the ordinary criminal law with regard to those very grounds. The detaining authorities may, as I pointed out earlier, detain a person although a criminal court has acquitted him of the very charge for which he is being detained under the Security Act. Therefore, in our opinion, when the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then the detaining authority has made his choice and it could not be permissible to him to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigation. Of course, it would be open to the detaining authorities to carry on an investigation into the offence provided they submit to the provisions of the law in this respect.'
>
> In my view therefore, the failure in this case of the Minister to proceed against the appellant under the criminal law of the country is no indication that he has acted in bad faith.

In similar vein, Edgar Joseph Jr J (as he then was) said in *Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1984] 1 MLJ 67 at p 72:

> As En Zaki who appeared for the respondent, rightly put it, the criminal conduct attributed to the applicant, namely, criminal intimidation and damage to property were in a specified locality, namely, the York Road area, Pulau Pinang, over a period of time, namely 1982–83, not merely in his capacity as an individual but as a member of a secret society. Now, the activities of secret societies in this country are, I think, sufficiently notorious for me to take judicial notice of and there is the further fact that the applicant was the subject of a Preventive Detention Order for six months ending in March 1982, on grounds similar to those presently mentioned. All these considerations are destructive of the submission that there was mala fides on the part of the respondent in making the impugned order.

As Abdoolcader J (as he then was) explained in *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279 at p 284:

> Mere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.

It is therefore clear that the arrest and detention of a person when he could have been prosecuted for a criminal offence is no indication mala fides. It is the detaining authority which is to decide whether an act which is criminal in character is of such nature or proportion as to threaten national security that it would be inadequate to deal with it as an ordinary criminal offence but warrants it being dealt with under the ISA. That is the law. Thus, it is inappropriate for a person or body of persons to call for the release of persons detained under the ISA and to prosecute and try them in an open court if they have committed any offence as it amounts to an unlawful interference with the lawful exercise of discretion by the detaining authority. I interpolate to add that it is no part of my function to delve into matters that have transpired outside the court. But where a party to a litigation relies upon such matters in support of its case it behoves upon me to ratiocinate their relevancy in order to explain to the party the validity of the reliance on such matters. While I am convinced that SUHAKAM acts with the best of intentions, it must be realized that it is of prime importance that issues of what the law is and what it can and should or ought to be are kept separate so as not to risk confusing the public and, unwittingly, adding the proverbial oil to the fire. What the law can and should or ought to be is a part of an inquiry or study for the purpose of proposals for recommendations for policy decisions leading to changes in the law. That is the province of politics. On the other hand, the court is confined in its duty to ascertaining what the law is and a corresponding application of it. It cannot afford, nor should it afford itself, the luxury of going beyond that. Confusing the law as it is with what it can and should or ought to be in the area of the law as in this case will only give false hopes to detainees and their understandably distraught loved ones, dependants, relatives and friends at a time when they are emotionally most vulnerable. False hopes only add to their pain when

what they need most in such circumstances is the best legal advice based on an objective and meticulous study of what the law is.

En Zainur Zakaria also contended that the press statement of the respondent containing mere allegations and accusations does not warrant detention under the ISA. The fact that the press statement is only a partial disclosure prevents me from considering this part of the submission as I explained earlier. Learned counsel then said that the affirmation of the further affidavit by the respondent stating that there are other reasons to justify the detention is an act of bad faith as he ought to have mentioned them in his press statement. This submission cannot also be sustained as it overlooks the right of the respondent under art 151(3) of the Constitution and s 16 of the ISA to make or not to make disclosures as he considers necessary. As I said in an earlier part of the judgment, there can be partial disclosure and partial non-disclosure of facts. Learned counsel also said that the filing of the further affidavit by the respondent is for an ulterior purpose. As I explained earlier this does not show bad faith on the part of the respondent. I must add that I am unable to consider the press statement of the respondent for the purpose of the deliberation in progress as it is only a partial disclosure. In any event, what has been disclosed does not reveal any mala fides. In the premises, I am satisfied that the applicant has not discharged the burden on him to show that the respondent acted mala fide in his arrest and detention.

Denial of legal representation

The remaining matter for consideration is whether the denial of legal representation to the applicant, if any, vitiates his detention. In response to a letter from solicitors for the applicant for counsel to be given access, the respondent by letter dated 13 April 2001 replied as follows:

> 2 Adalah dimaklumkan bahawa penama di atas telah ditangkap di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('AKDN'), pada 10 April 2001 kerana dipercayai telah terlibat dalam kegiatan-kegiatan yang boleh memudaratkan keselamatan Malaysia. Siasatan ke atasnya masih diteruskan di bawah s 73(3)(a)(b) dan (c) Akta Keselamatan Dalam Negeri 1960 ('AKDN') sehingga penyiasatan ke atasnya tamat. Penama kini berada dalam keadaan baik, sihat dan tidak membimbangkan.
>
> 3 Sekiranya pihak puan mempunyai sebarang masalah berhubung dengan penahanannya, pihak puan boleh berhubung terus dengan kami.

In his submission, En Sivarasa referred to cases such as *Ooi Ah Phua v Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116 and *Theresa Lim Chin Chin*'s case to argue that the respondent can only refuse legal access to the applicant if he has substantial grounds not to do so. He submitted that failure to accord legal representation renders the detention illegal where more than one ground is advanced to impugn the detention. In support of this contention, he referred to a passage from *Ooi Ah Phua*'s case at p 201:

> In any event, I do not think that habeas corpus is the right remedy for the applicant if his only complaint is that after his son, Ooi's arrest, his solicitor was denied immediate access to Ooi.

It is my view that the right to legal access in the case of a person detained under the ISA must be considered in the light of art 151(3) of the Constitution and s 16 of the ISA. These provisions authorize the detaining authority to refuse to disclose facts if such disclosure is against the national interest. I can safely assume that in the course of investigating into the activities of a detainee, the police may have told the detainee certain facts and vice versa which may warrant further investigation. That is part of the investigative process. Such communications may fall within the ambit of the two provisions of law that I have referred to and the detaining authority may not want their revelation for the moment. If access is allowed to a detainee in such circumstances, there is a possibility that he may part with whatever information that has been communicated to him. Denial of legal access to a detainee till the police think that it is appropriate to do so is, to my mind, to achieve the object of the provisions permitting non-disclosure of facts. It is perhaps for this reason that Salleh Abas LP said in *Theresa Lim Chin Chin*'s case at pp 297–298:

> When should a detainee arrested under s 73 of the Internal Security Act be allowed to exercise his right under art 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198. In other words, the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of art 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the article.

This view is a balance between the interests of the person detained and the interests of the state. As Raja Azlan Shah FJ (as his Highness then was) said in *Hashim bin Saud*'s case at p 118:

> We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the state, and not enough is paid to the interests of the state.

The matter must therefore be left to the good judgment of the detaining authority. A detainee under the ISA can therefore have legal access only when it does not interfere with police investigation. Even if this conflicts with art 5(3) it is validated by art 149 of the Constitution. To that extent, it is my view that the letter by the respondent to the solicitors could have been better articulated though, as it stands, it conveys the same meaning couched, perhaps, in a vague manner. Be that as it may, the applicant has failed to show that the police has deliberately and with bad faith obstructed him from exercising his right under art 5(3) of the Constitution. The police action in denying legal access is therefore in accordance with law. Even if the applicant had been denied legal access unlawfully, it has no bearing on

A the application before me. In support of this proposition, I refer to the passage in *Ooi Ah Phua*'s case referred to by learned counsel. But I do not propose to confine myself to just that passage but also to what follows it which puts the matter under discussion to rest. This is what Suffian LP said at p 201:

> B In any event, I do not think that habeas corpus is the right remedy for the applicant if his only complaint is that after his son, Ooi's arrest, his solicitor was denied immediate access to Ooi. The juxtaposition of cll (2) and (3) of art 5 does not mean that a person who is denied immediate access to his lawyer has his remedy by way of habeas corpus, for it is possible for a person to be lawfully detained and yet unlawfully denied communication with his C lawyer. With respect I agree with the learned Chief Justice of Singapore in *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137 when he said at p 141:
>
> > 'In my judgment habeas corpus is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police ... has been refused by the police to be allowed his constitutional D right under art 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies …'

I pause to add that if a constitutional right can be delayed, I do not see any reason why a similar right provided by other laws such as s 2(d) of the Human Rights Commission Act 1999 cannot be similarly delayed lawfully. E

Section 8B(1) of the ISA

Section 8B(1) of the ISA reads as follows:

> F There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

G Dato Abdul Gani Patail argued that this provision should be extended to apply to s 73(1) of the ISA as well. In support he referred to *Theresa Lim Chin Chin*'s case where ss 8(1) and 73(1) of the ISA were described as parts of one whole scheme. In opposing this argument, En Zainur Zakaria contended that such a construction of s 8B(1) of the ISA is not permissible as the ISA must be strictly construed. In support of his H argument, he referred to *Liew Sai Wah v Public Prosecutor* [1968] 2 MLJ 1, where Viscount Dilhorne in delivering the advice of the Privy Council said at p 2:

> The Internal Security Act is a penal Act and must be construed strictly. In *Halsbury's Laws of England*, Vol 36 p 415 para 631 the following appears:
>
> > I 'It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, there remains any doubt or

> ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.'

As Lord Simonds said in *LNE Ry Co v Berriman* [1946] AC 278 at p 313:

> 'A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court.'

Section 8B(1) of the ISA is not a penal provision. It deals with the ouster of jurisdiction of the courts. The relevant rules of construction would therefore be those governing such ouster, in *Secretary of State v Mask & Co* AIR 1940 PC 105, it was held that the exclusion of jurisdiction of courts is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. This rule of construction is not limited to civil courts alone, but applies to all courts of general application including criminal courts (see *Bhimsen v State of UP* AIR 1955 SC 435). It is a principle by no means to be whittled down and has been referred to as a 'fundamental rule' (see *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors* [1959] 3 All ER 1). It is plain that s 8B(1) of the ISA does not contain express words to make it applicable to s 73(1) of the ISA as well. What therefore requires consideration is whether the language employed in s 8B(1) of the ISA implies its application to s 73(1) of the ISA.

In order to answer that question, it is first necessary to consider the object and scope of the ISA. It is a law that deals with preventive detention. It has been recognized that in matters relating to preventive detention, the judges are the executive. The ISA is unquestionably not an ordinary regulatory legislation. Its object is to defend and uphold the national interest which includes threats to the very existence of the nation and its system of government under the Constitution. It is for that reason that art 149 of the Constitution provides that such a law is valid even though it is inconsistent with any of the provisions of arts 5, 9 or 10. Even the Universal Declaration of Human Rights 1948 ('the said') recognizes that there can be restrictions in the exercise of a person's rights and freedoms by laws relating to inter alia, public order. Article 29(2) of the said Declaration reads as follows:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

I must add that the Human Rights Commission of Malaysia Act 1999 must be read and understood in this context pursuant to its s 4(4) which reads as follows:

> For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

It is therefore, manifestly patent that no valid complaint can be made or entertained on restrictions imposed on a person's rights and freedoms in the face of their conflict with a law relating to public order though the very existence of such a law can be criticized. As the ISA has the highest purpose

and objective to serve, though regarded by some as draconian, the applicability of s 8B(1) to s 73(1) of the ISA must be considered against that background.

There is an inseparable nexus between ss 8(1) and 73(1) of the ISA. The arrest and detention of a person under the latter is pending inquiries to see if an order under the former should be made by the minister. It is this connection between the two sections that caused Salleh Abas LP to say in *Re Tan Sri Raja Khalid bin Raja Harun*'s case at p 186:

> It is clear from the language of the two sections that s 73 provides for the initial detention and cannot be divorced from s 8 of the Act which provides for the final detention.

Accordingly, the (then) Supreme Court proceeded to hold that since s 73(1) and s 8 of the ISA are so inextricably connected, the subjective test should be applied to both. It is the nexus between both the sections that compelled the (then) Supreme Court in *Theresa Lim Chin Chin*'s case to hold that s 16 of the ISA which is confined to 'this chapter also applies to s 73(1) of the ISA which appears in another chapter. As Salleh Abas LP said at p 296:

> En Sri Ram contended that this section is only confined to the provision of 'this chapter', and since the chapter under which s 16 is enacted is preventive detention pursuant to a ministerial order under s 8, it therefore cannot apply to the arrest at the initial stage pursuant to police power under s 73. This argument could only be right if we accept that there are two preventive detentions. We do not accept that argument. We regard that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under s 73. We accept that the initial arrest and detention may or may not result in the issuing of the ministerial order of detention under s 8, but nevertheless, it is within one scheme of the preventive detention legislation.

The highest court in the land has thus determined that ss 8(1) and 73(1) of the ISA must be read together as they are inseparable. A ministerial order of detention cannot be made under s 8(1) of the ISA without the initial arrest, detention and inquiries conducted under s 73(1) of the ISA. They are therefore interdependent. The qualified right of judicial review available to impugn an act done or decision made by, inter alia, the minister in the exercise of his discretionary power in accordance with the ISA would be meaningless if the process of collecting materials to be considered for the exercise of such discretion is not subjected to a similar qualification. In my opinion, bearing in mind the object of the ISA and the role of the courts in cases of preventive detention, the restriction on the right of judicial review is of greater significance in the case of s 73(1) than s 8(1) of the ISA in view of the greater dependence of the latter on the former. Section 8(1) of the ISA cannot function without s 73(1) of the ISA. In the premises, it is my view that Parliament clearly intended s 8B(1) to apply to s 73(1) of the ISA as well. I am guided in this interpretation by the interpretation given to s 16 of the ISA in *Theresa Lim Chin Chin*'s case. The view that I have expressed

requires a consideration of s 88(1) of the ISA in order to determine the manner in which the applicant can challenge his arrest and detention. This section is a statutory reiteration in answer to the rejection of the subjective test enunciated in *Karam Singh*'s case by the Singapore Court of Appeal in *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69. In saying this, I refer to the Explanatory Statement to Amendment Act No 739 which introduced s 8B(1) of the ISA. It reads as follows:

> The new s 8B removes from judicial review all acts done and decisions made by the Yang di-Pertuan Agong or the Minister in exercise of their discretionary power under the Act except in regard to any procedural requirement governing such act or decision. The intention of this new section is to decisively reaffirm the principle that the subjective test applies in determining the proper exercise of discretionary power by the Minister as laid down in the case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, followed in the case of *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293. This provision is necessary to avoid any possibility of the courts substituting their judgment for that of the Executive in matters concerning security of the country as has been done by courts in certain foreign countries which base their decisions on conditions totally different from Malaysia's. In matters of national security and public order, it is clearly the Executive which is the best authority to make evaluations of available information in order to decide on precautionary measures to be taken and to have a final say in such matters; not the courts which have to depend on proof of evidence.

The provision in s 8B(1) of the ISA that there shall be no judicial review in any court in the case of, inter alia, a decision made by, inter alia, the minister in the exercise of his discretionary power in accordance with the ISA means that the exercise of the discretion cannot be challenged. But it must be shown that the discretion was exercised in accordance with the ISA. This is an affirmation of the subjective test with the onus cast on the minister to show that the detention was done in the exercise of a valid power. Thereafter the onus shifts to the detainee to show that the exercise of the power was mala fide. I pause to add, with respect, that I am unable to agree with the view expressed in *Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 3 MLJ 265, on a construction of s 7C of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, similar to s 8B(1) of the ISA, that the court's jurisdiction on matters of mala fide is excluded. That view stemmed from the Singapore case of *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137 which is not the law in Malaysia. What, however, is now excluded is the objective consideration of facts as done in *Re Tan Sri Raja Khalid bin Raja Harun*'s case. As I have already considered the issue of mala fides earlier it is unnecessary for me to go over it again.

In the upshot, it is my view that the applicant has not discharged the burden on him following the discharge of the burden by the respondent on him. Accordingly, I dismiss the motion of the applicant and that of the other four detained persons. I am unable to make an order of legal access to the applicant, as applied for by En Sivarasa in the event I dismiss the

application, as that is a matter for the detaining authority to decide. Needless to say, I would have done so if it had been established that the police had deliberately and with bad faith obstructed the applicant from exercising his right under art 5(3) of the Constitution which was not done. I did the most that I could in inviting learned counsel to write again to the police to request for an interview with his client. That would have at least been a court supervised application. Unfortunately, my invitation was not accepted. There is nothing more that I can lawfully do.

Motions dismissed.

Reported by Andrew Christopher Simon